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SERVICE DATE - NOVEMBER 15, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 208X)

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY
–ABANDONMENT EXEMPTION–
IN CUMBERLAND AND ROANE COUNTIES, TN

Decided: November 13, 2000

By petition filed on July 28, 2000, The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad known as the Crab Orchard Line, between milepost 141.5-H at Crab Orchard and milepost 156.9-H at Rockwood, a distance of 15.4 miles in Cumberland and Roane Counties, TN. CNOTP also seeks to be exempted from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. The line's only active shipper, Franklin Industries Inc. (Franklin Industries), supports the proposed abandonment.¹

Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (65 FR 50274) on August 17, 2000, instituting an exemption proceeding. We will grant an exemption from 49 U.S.C. 10903-05, subject to two environmental conditions and standard employee protective conditions.

BACKGROUND

CNOTP, a wholly owned subsidiary of Norfolk Southern Railway Company (NSR),² operates a railroad in Ohio, Kentucky, and Tennessee. CNOTP here seeks to abandon a 15.4-mile segment of a dead-end branch line that traverses sparsely populated, rugged, and mountainous terrain and serves only one shipper. Petitioner asserts that the traffic on the line is insufficient to justify required maintenance and rehabilitation costs. According to petitioner, while the 10-year projected maintenance expense for the line has been calculated at \$7,255,200, the railroad would be required to expend \$4,349,400 in program maintenance and rehabilitation within the next year to keep the line at proper maintenance standards. Petitioner adds that, due to

¹ Letter of support attached as Exhibit B.

² NSR is a wholly owned subsidiary of noncarrier Norfolk Southern Corporation. NSR operates a rail system in 23 eastern states, including Tennessee, and in Ontario, Canada.

the distance from the terminal and the rugged nature of the terrain, the railroad often incurs substantial additional labor costs in operating the line. Crews serving it frequently can only complete their round trip over the line by working overtime.

CNOTP further states that abandonment of the line will not result in the cessation of service to the shipper. In fact, petitioner has arranged to sell the line to Franklin Industries, which will continue to operate the line as a private industrial lead track. Franklin Industries will also continue to receive service from CNOTP to and from Rockwood, while the shipper provides its own switching service from and to Crab Orchard over the line as a private track.³ Petitioner avers that the shipper can operate the line more economically with a crew dedicated only to serving the line, and that providing intra-plant services will make the shipper's overall operation more efficient. Petitioner adds that the shipper can justify investment in the line because it can rehabilitate, maintain, and operate the line more economically than can CNOTP.

Petitioner indicates that there is little industry in the immediate vicinity, that no additional rail traffic for movement over the line can be anticipated, and that the potential for increased traffic cannot be expected to cover projected costs. CNOTP adds that there is no overhead traffic on the line and no potential for such traffic because it is a dead-end branch line. Finally, petitioner states that it needs to invest its limited resources in lines that have a greater traffic density and that can be operated profitably.

DISCUSSION AND CONCLUSIONS

Abandonment exemption. Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving CNOTP of the cost of owning and maintaining the line and allowing it to apply its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely. Under the proposed exemption, petitioner will be able to consummate the abandonment more expeditiously and transfer the right-of-way to Franklin Industries for continued rail use as a private industrial lead track.

³ Petitioner notes that truck and intermodal rail transportation options will also be available.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. Abandonment of the rail line is not opposed by the sole shipper and, indeed, is strongly supported by the shipper, which will continue to operate over the line for its own account. Truck service and intermodal rail operations are also available. There is no overhead traffic on the line and no potential for any because the line is a dead-end branch line. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Other exemptions. To expedite the post-abandonment transfer of the right-of-way needed by the shipper, CNOTP requests that the abandonment of the line be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. According to petitioner, exemption from the OFA and public use requirements is needed to prevent delays in the sale of the line for continued rail use by Franklin Industries and the beginning of necessary maintenance and rehabilitation of the line by the shipper. CNOTP has also requested that the exemption be made effective immediately on service or on an expedited basis.

We will grant petitioner's request for an exemption from sections 10904 and 10905. The abandonment petition and the requests for exemption from the OFA process and the public use process have been noticed in the Federal Register. No requests for an OFA or a public use condition and no objections to the proposed exemptions from sections 10904 and 10905 have been received. Denying the petitioner's request would serve no useful purpose and would delay the transfer of the right-of-way to the line's sole shipper for use as a private industrial lead track. This could delay the performance of needed rehabilitation and maintenance of the line. Accordingly, we will exempt the proposed abandonment from the OFA and public use requirements of 49 U.S.C. 10904-05.

The evidence of record establishes that the proposed exemption from 49 U.S.C. 10904-05 meets the criteria of 49 U.S.C. 10502. Applying the OFA or public use requirements in this instance is not necessary to carry out the rail transportation policy. Moreover, allowing the abandonment exemption to become effective immediately, without first being subject to these requirements, will minimize the need for Federal regulatory control over the rail system, expedite regulatory decisions, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. We have already determined that regulation is not necessary to protect shippers from an abuse of market power.

Labor protection. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Environmental conditions. CNOTP has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to

submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on September 27, 2000.

In the EA, SEA indicated that the Tennessee State Historic Preservation Office (SHPO) and the U.S. Fish and Wildlife Service (FWS) have not yet completed their review of the proposed abandonment. SEA, therefore, recommended that the following conditions be imposed on any decision granting abandonment authority: (1) that CNOTP shall further consult with the Tennessee SHPO and retain its interest in and take no steps to alter the historic integrity of the line segment until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) that CNOTP shall be prohibited from salvaging or disposing of the entire right-of-way until completion of the section 7 process of the Endangered Species Act, 16 U.S.C. 1531.

No comments to the EA have been filed by the October 26, 2000 due date. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Other matters. Having determined to exempt the abandonment from 49 U.S.C. 10904-05, we have partially eliminated the need to extend the effective date of the abandonment exemption to consider OFAs under Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987), and requests for public use conditions under 49 CFR 1152.28(a)(2). We will also not provide any opportunity for interested persons to file trail use/rail banking requests. Under section 8(d) of the Trails Act, trail use/rail banking is voluntary and can only be implemented if an abandoning railroad agrees to negotiate an agreement. See section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Here, CNOTP has made it clear that it will not entertain trail use requests. Finally, we will also grant petitioner's request for expedited effectiveness of the exemption granted here. The record supports a need for such expedition. Accordingly, we will make the subject exemption effective on the service date of this decision.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the requirements of 49 U.S.C. 10903-05 the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that: (1) CNOTP shall further consult with the Tennessee SHPO and retain its interest in and take no steps to alter the historic integrity of the line segment until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (2) CNOTP shall be prohibited from salvaging or disposing of the entire right-of-way until completion of the section 7 process of the Endangered Species Act, 16 U.S.C. 1531.

2. This exemption will be effective on November 15, 2000 and petitions to reopen must be filed by December 5, 2000.

3. Pursuant to the provisions of 49 CFR 1152.29(e)(2), CNOTP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CNOTP's filing of a notice of consummation by November 15, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary